NYSBA Environmental and Energy Law Section
8th Annual Oil Spill Symposium
Wednesday, June 7, 2017
Albany, New York

"Financing Issues in Petroleum Spill Cases"

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Generally, real estate financing is available even on environmentally sensitive sites, although there's been a tightening of credit and lending criteria because of financial markets and fed scrutiny and frequent audits of banks and lenders by regulators. Most financial transactions involving spill sites can be analyzed in terms of due diligence, identification of lender's risks, and customary risk control mechanisms.

I. Due Diligence

- defining due diligence scope
- consultants – "approved" consultants; bank consultant lists
- phase I
- peer review common today
- peer reviewers often recommend Phase II for former or current spill sites, even for NFA sites
- beware the "white wash" and "chicken little" (sky is falling) Phase I's
- know your consultant and proactively discuss scope and recommendations with lender, consultants and stakeholders.
- In NYC look for "E" designations; affects and controls new construction and renovations

II. Identification of Lender's Risks (Land Loans vs. Construction Loans)

- analysis of Phase I and Phase II; modifications?
- historical uses of concern (industrial, railroad tracks, wetlands, farms?)
- petroleum is concern
- TCE/PCE much bigger concern
- vapor and indoor air concerns
- tanks?
- development covers a lot of sins; best remedial method
- all about the risk of foreclosure and potential liability – (i) in construction loan transactions banks are concerned about half finished projects with contamination; (ii) in land/acquisition financing, banks are concerned about being able to lease out property without doing any improvements or repairs
- all depends on bank, and bank customer relationship

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III. *Lender Risk Control Mechanisms*

- construction loans vs. land loans
- rawp as a bank risk control
- PLL insurance
- Environmental indemnity agreement- often contains post closing obligations re contamination, investigation, remediation, nfa, etc.
- personal guaranties - enviro and "bad boy" acts as non-recourse carve outs
- post closing undertaking agreement
- special bank covenants
- use of Brownfields as a lender risk control-requiring entry into Brownfields program
- cost estimation of investigative/remedial work to be completed
- escrows
- land use and area subsurface disturbance restrictions in covenants, EIA, etc.

General Questions/issues:

1. What does a bank actually look for and look at behind the scenes?
2. How do the lender business people and the risk and underwriting coordinate and resolve their differences?
3. How do lenders analyze environmental risks?
4. What is the purpose of peer reviewing?
5. What are "bad boy guaranties" - bad acts carve outs from non-recourse loan guaranties- oft times include violations of Environmental Laws, converting a non-recourse loan into a full recourse loan.
6. 2 types of loans- dirt/acquisition loans and construction loans. Banks scrutinize dirt/acquisition loans/refi's more than construction loans.
7. Results sometimes depends on whether a loan will be resold to another bank.
8. Can a ESA report be amended or modified?